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IN THE

Supreme Court of the United States

No. 71-227

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORP., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

JOHN F. DONELAN
FREDERIC L. WOOD
914 Washington Building
Washington, D. C. 20005

Counsel for Appellee,
The National Industrial
Traffic League

Of Counsel:

DONELAN, CLEARY AND CALDWELL
914 Washington Building
Washington, D. C. 20005

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MOTION TO AFFIRM

Appellee, The National Industrial Traffic League, pursuant to Rule 16 of the Rules of the Court, moves that the final judgment and decree of the United States District Court for the Western District of Pennsylvania be affirmed on the grounds that the lower court's decision is clearly correct and should be affirmed without further review.

OPINIONS BELOW

The opinion of the district court is set forth as Appendix A to the jurisdictional statement of the Appellants. The reports and orders of the Interstate Commerce Commission are reproduced in Appendices C-E therein.

JURISDICTION

The judgment of the three-judge district court was entered on March 18, 1971. Notices of appeal were filed by the appellants on May 17, 1971. (See Appendices G & H of the jurisdictional statement.) The jurisdiction of this court is based on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

The primary and ultimate question presented is whether the district court was correct in enjoining the Commission from ordering the nation's railroads to observe certain car service rules requiring the return of freight cars to the owning railroad.

A determination of this question involves, at the least, these subsidiary questions:

1. Whether the court below correctly held that the Commission's order was not supported by adequate findings.

2. Whether the court below correctly held that the car service rules were unreasonable rules when prescribed for mandatory observance.

STATUTES INVOLVED

In addition to Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), (set forth at pages 3-4 of the Government's jurisdictional statement), this case involves Sections 1(17)(a) and 10(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1(17)(a) and 10(1), as well as Section 1 of the Elkins Act, 49 U.S.C. §41(1). Also involved are the National Transportation Policy, 49 U.S.C. preceding § 1, and certain sections of the Administrative Procedure Act, 5 U.S.C. §§ 553, 556, 557 and 706. All of these provisions are set forth in Appendix A.

STATEMENT OF THE CASE

This proceeding originated nearly eight years ago as an effort by the Commission to determine the extent of and the reasons for the continuing failure of the nation's railroads to provide an adequate supply of freight cars. At the same time, the Commission proposed to examine possible solutions to the car supply problem.

In an order of July 29, 1964, the Commission began a fact-finding investigation of the adequacy of freight car supply with a view towards prescribing rules, if shown to be necessary. A very extensive record was developed, with participation by the Commission staff, railroad and shipper associations and individual railroads and shippers.

The hearing examiner, after considering the record, declined to recommend the prescription of mandatory car service rules. The Commission, by its Division 3, reversed the examiner's conclusion concerning the prescription of mandatory car service rules. It did this after finding that there was a car supply problem, a finding the examiner declined to make. (See pages 52-53 and 60-67 of the Government's jurisdictional statement.) Division 3 ordered prescription in spite of the overwhelming opposition from interested parties contained in the administrative record. The Commission affirmed the Division's decision in an order entered February 18, 1970.

On judicial review, the district court enjoined the Commission from enforcing Car Service Rules 1 and 2, on the grounds that there were not adequate findings in the report to support the Commission's order and that the rules failed to meet the test of reasonableness. (See Appendix A to the jurisdictional statement, page 13.) In particular, the court found (a) that there was no finding of a specific freight car shortage on the car-owning railroads; (b) that the Commission failed to consider the financial effect the car service rules would have on both the railroads and shippers and (c) that liability for criminal penalties for violation of the car service rules would be unreasonable when complete compliance could not be expected by the Commission.

ARGUMENT

The decision of the court below is so obviously correct that it should be affirmed without further review by this Court.

The National Transportation Policy, 49 U.S.C. preceding Section 1, requires the Commission to administer the Interstate Commerce Act "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of the commerce of the United States . . . ." In the past, this Court has ". . . made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957).

The National Industrial Traffic League (hereinafter referred to as the League) is the largest diversified shipper organization in the United States. It is readily apparent that the League and its members have a keen interest in the adequacy of the supply of freight cars provided by the nation's railroads. The League has actively participated in this case since its inception at the Commission. It has submitted evidence through Mr. Frank L. Merwin, a Vice President of American Smelting and Refining Co., with an extensive background in transportation and traffic management. At the time he appeared before the Commission, Mr. Merwin was Chairman of the League's Executive Committee, and he is currently serving as its President.

Because of its interest in obtaining effective solutions to the car supply problem, the League has also participated in another major proceeding before the Commission.[1]

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[1] Docket Ex Parte Nos. 252 and 252 (Sub-No. 1), *Incentive Per Diem Charges–1968*, 332 I.C.C. 11 (1967), 337 I.C.C. 183 (1969), 337 I.C.C. 217 (1970), 339 I.C.C. 627 (1971), sustained on review *sub. nom. Long Island R. Co. v. United States*, 318 F. Supp. 490 (E.D.N.Y., 1970), and reversed and remanded on review *sub. nom. Florida East Coast Ry. Co. v. United States*, 322 F. Supp. 725 (M.D. Fla., 1971), appeal docketed June 14, 1971, No. 70-279.

When viewed in the context of their continuing efforts to alleviate the car supply problem, the opposition of the League and other shippers to the Commission-ordered mandatory observance of Car Service Rules 1 and 2 takes on special meaning.

As the opinion of the court below said:

> "Absent isolated endorsements, the shipping public was generally opposed to the mandatory rules . . .
>
> "Witnesses for the National Industrial Traffic League, the largest diversified shippers' organization in the United States, testified that, far from advancing effective car utilization, mandatory enforcement would seriously obstruct and undermine railroad car utilization, and that the necessary consequence would be delay, waste in railroad operations, and disruption of shippers' production and distribution program."[2]

It is apparent that the mandatory observance of Car Service Rules 1 and 2 would be wholly antithetical to the requirements of the National Transportation Policy. There is no finding in the Commission's report that such mandatory observance would improve the freight car supply, either in the short or the long run. See *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962). In such a case, the district court was required by the Administrative Procedure Act to set aside the Commission's action.[3] See *Baltimore & O. R. Co. v. Aberbeen & R.R. Co.*, 393 U.S. 87, 91 (1968). On this basis alone the judgment of the court below should be affirmed.

The arguments presented by the appellants in their jurisdictional statement that the court below erred in enjoining the car service rules are not persuasive of the need for further review. Appellants place great weight on the Com-

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[2] See pages 21-23 of the jurisdictional statement. See also notes 6 and 7 therein to the opinion of the court below.

[3] 5 U.S.C. § 706(2)(E).

mission's "policy determination" and the "exercise of its judgment and discretion" (jurisdictional statement, page 9). But it has already been shown that this exercise of expertise is unsupported by adequate findings. The teachings of *Baltimore & O. R. Co. v. Aberdeen & R.R. Co., supra,* at page 92, are especially pertinent on this point:

> "The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming '"a monster which rules with no practical limits on its discretion."' Burlington Truck Lines v. United States, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act."

These principles preclude the Commission from relying in this case on its expertise in the absence of adequate findings in its report.

The decision of the court below should also be affirmed without further review because it correctly found that the car service rules were not "reasonable" as required by 49 U.S.C. §1(14)(a). This requirement has been previously construed to mean that the regulatory measure must have "a real and substantial relation to the object sought to be obtained."[4]

There can be no question that Car Service Rules 1 and 2 fail to meet these criteria. Not only would the mandatory observance of the rules be unreasonable *per se*, but, as the court below pointed out, the Commission report and order has failed to deal carefully with the substantial financial impact enforcement of the rules would have on both railroads and shippers. (See pages 21-23 of the jurisdictional statement.)

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[4] *Palmer v. United States,* 75 F. Supp. 63, 68 (D.D.C., 1947).

The court below also considered the lack of "ascertainable standards of guilt" when violators of the regulation would be subject to criminal penalties to be indicative of unreasonableness. The potential penalties range from $100 to $500 fines for each offense (plus $50 per day for each day it continues)[5] through a $5,000 fine[6] or two years imprisonment.[7] Yet the witness for the Commission's Bureau of Enforcement conceded that they would not expect more than 80% compliance.[8] This is clearly an unreasonable scheme of regulation.[9]

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[5]Section 1(17)(a).

[6]Section 10(1).

[7]Section 1 of the Elkins Act.

[8]Examiner's report page 24, quoted in opinion of court below, see page 24 of jurisdictional statement.

[9]The Government points out that procedures are available to obtain exceptions to the rules. These procedures first became part of the prescribed rules when the entire Commission reviewed the decision of Division 3. Again, the lack of reasoned findings and substantial evidence to support these procedures for obtaining exceptions, which were never considered by the parties, the examiner or Division 3, is obvious. The principles of the *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.* decision, *supra*, make these procedures wholly unacceptable.

CONCLUSION

Wherefore, Appellee The National Industrial Traffic League respectfully submits that the decision of the court below is so clearly correct as not to require further review by this Court. Appellee respectfully moves the Court to affirm the judgment and decree entered by the United States District Court for the Western District of Pennsylvania.

Respectfully submitted,

JOHN F. DONELAN
FREDERIC L. WOOD
914 Washington Building
Washington, D.C. 20005

Counsel for Appellee,
The National Industrial
Traffic League

Of Counsel:

DONELAN, CLEARY
AND CALDWELL
914 Washington Building
Washington, D.C. 20005

October 15, 1971

PROOF OF SERVICE

I, John F. Donelan, Counsel for Appellee hereby certify that on the 15th day of October, 1971, I served the foregoing Motion to Affirm upon all parties of record by mailing 3 copies thereof, first class postage prepaid, in accordance with Rules 33(1) and 33(2)(a) of this Court, as follows:

Honorable Erwin N. Griswold
Solicitor General
U.S. Department of Justice
Washington, D. C. 20530

Fritz R. Kahn, Esquire
Cr. Betty Jo Christian
James F. Tao, Esquire
Interstate Commerce Commission
Washington, D.C. 20423

William M. Moloney, Esquire
James I. Collier, Esquire
1920 L Street, N.W.
Washington, D.C. 20036

Gordon E. Neuenschwander, Esquire
P. & L.E. Terminal
Pittsburgh, Pennsylvania 15222

Max O. Truitt, Jr., Esquire
900 - 17th Street, N.W.
Washington, D.C. 20006

Dwight L. Koerber, Esquire
1447 Oliver Building
Pittsburgh, Pennsylvania 15222

JOHN F. DONELAN

APPENDIX A

STATUTES

49 U.S.C. §§ 1(17)(a) and 10(1)

§ 1(17)(a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this part, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however*, That nothing in this part shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part and except as otherwise provided in this part.

§ 10(1) That any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or

required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Section 1, Elkins Act, 49 U.S.C. § 41(1)

That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act

to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

National Transportation Policy, 49 U.S.C. preceding Section 1

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimintions, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Administrative Procedure Act, 5 U.S.C.
Sections 553, 556, 557 and 706

Sec. 553. Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved–

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include–

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply–

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Sec. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee

may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial

licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Sec. 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(C) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

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v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE MOTIONS TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE MOTIONS TO AFFIRM

1. If the responsibility of the Interstate Commerce Commission for assuring to the shippers of this Nation the availability of railroad freight cars were limited to regulating the distribution of existing freight cars to provide for maximum utilization, we might agree with the view that the Car Service Rules at issue should not have been promulgated for mandatory observance, for, as the appellee railroads correctly note (Motion to Affirm of Association of American Railroads, p. 11), the pattern of movements that the Rules would impose is not one that normally would

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